

Attachment 2: Reply Comments of ITAA
 CC Docket No. 96-45 et al.
 Universal Service FNPRM
 (May 13, 2002)

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of	
Federal-State Joint Board on Universal Service	CC Docket No. 96-45
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated With Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	CC Docket No. 98-171
Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	CC Docket No. 90-571
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	CC Docket No. 92-237 NSD File No. L-00-72
Number Resource Optimization	CC Docket No. 99-200
Telephone Number Portability	CC Docket No. 95-116
Truth-in-Billing and Billing Format	CC Docket No. 98-170

**Reply Comments of the
Information Technology Association of America**

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SUMMARY

The Commission should reject the SBC/BellSouth “Joint Proposal” and the Verizon proposal, both of which would require Information Service Providers (“ISPs”) to make direct payments to the Universal Service Fund (“USF”).

The Commission Should Reject the SBC/BellSouth “Joint Proposal”

Contrary to SBC’s assertion, the service that ISPs provide is fundamentally different from the service that interexchange carriers (“IXCs”) and resellers provide. ISPs, therefore, should not be subject to the same USF payment obligations. IXCs and resellers provide a “pure” transmission service directly to the public for a fee. By contrast, an ISP *uses* telecommunications – in conjunction with its own computer processing capabilities – to provide a service that allows its subscribers to access, manipulate, and/or store information. Because ISPs do not *provide* telecommunications or telecommunications services to any party, the Commission lacks statutory authority to adopt any proposal that would require them to make direct payments to the USF.

In any case, SBC and BellSouth have provided virtually no justification for the radical change in policy that they propose. To the extent SBC and BellSouth are suggesting that the Commission should require ISPs to make direct USF payments in order to remedy “bypass” of the public switched network resulting from so-called Internet Telephony services, there is no evidence that these services are having any discernable effect on universal service. Nor can the two BOCs justify their proposal as a means to prevent competitive distortion. Under the connection-based system proposed by the Coalition for Sustainable Universal Service (“Coalition”), no ISP would be required to make direct payments to the USF. Rather, ISPs would continue to support universal service through the payments that they make to their

telecommunications provider. As a result, all ISPs that use carrier-provided telecommunications facilities would be on an equal competitive footing.

The SBC/EllSouth Joint Proposal would have two additional adverse consequences for ISPs. First, it would substantially increase the cost of Internet access service, especially for residential customers that seek to obtain broadband connections, thereby artificially suppressing demand. And, second, it would provide carrier-affiliated ISPs with an unfair competitive advantage over their non-carrier affiliated competitors.

The Commission Should Reject Verizon's Schools and Libraries Proposal

Verizon has advanced a narrower proposal, under which the Commission would require broadband ISPs to contribute to the schools and libraries portion of the USF. Because ISPs do not provide telecommunications to schools and libraries, the Commission lacks statutory authority to adopt the Verizon proposal. Verizon's suggestion that allowing ISPs to participate in the schools and libraries program, even though they are not required to make direct payments to the USF, violates "competitive neutrality" is nothing more than old whines in new dockets. The Commission and the Court of Appeals have directly considered whether allowing ISPs to participate in the schools and libraries program violates the principle of competitive neutrality. Both have concluded that it does not.

The Burden of Funding Any Future Growth in the USF Should be Shared Proportionately by All User Classes

The Commission should adopt procedures that will ensure that the new connection-based methodology does not adversely affect any class of users, and that the burden of funding any growth in the USF is shared proportionately among all user classes. ITAA believes that a procedure that would provide for an *automatic, annual, proportionate adjustment* of the assessment rate for *all* connections – whether provided to residential, single-line business,

wireline, or multi-line business customers – offers an effective means to ensure that the burden of any further growth in the USF is shared equitably among all classes of users.

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Truth-in-Billing and Billing Format	CC Docket No. 98-170

Reply Comments of the Information Technology Association of America

The Information Technology Association of America (“ITAA”) hereby replies to the comments filed in response to the Commission’s Further Notice of Proposed Rulemaking (“*Further Notice*”) in the above-captioned proceeding.

INTRODUCTION

SBC, BellSouth, and Verizon seek to use this proceeding to request, yet again, that the Commission require Information Service Providers (“ISPs”) to make direct payments to the

Universal Service Fund (“USF”). Under the SBC/BellSouth “Joint Proposal,” all ISPs would be required to make direct payments to the USF in exactly the same manner as interexchange carriers (“IXCs”) and resellers. Somewhat more narrowly, Verizon seeks to promote “competitive neutrality” by requiring all “broadband providers” – including broadband ISPs – to make direct payments to the schools and libraries portion of the USF.

The three Bell Operating Companies (“BOCs”) have completely ignored statutory language, legislative history, the Commission’s prior determinations, and directly relevant decisions by the Courts of Appeals. As demonstrated below:

- Because ISPs do not “provide” telecommunications or telecommunications services to anyone, the Commission does not have statutory authority to adopt any proposal that would require ISPs to make direct payments to the USF.
- Allowing ISPs to provide Internet access service to schools and libraries, despite the fact that they are not required to make direct payments to the USF², does not violate the principle of competitive neutrality.

The Commission, therefore, should – and, indeed, must – reject the BOCs’ proposals.

I. THE COMMISSION SHOULD REJECT THE SBC/BELLSOUTH “JOINT PROPOSAL,” WHICH WOULD REQUIRE ISPs TO MAKE DIRECT PAYMENTS TO THE UNIVERSAL SERVICE FUND

SBC and BellSouth have jointly submitted a proposal (the “Joint Proposal”) that would require all ISPs to make direct payments to the Universal Service Fund in exactly the same manner as facilities-based common carriers.¹ Under the Joint Proposal, “[e]ach retail relationship” with the provider of a Qualifying Service Connection (“QSC”) would “generate[] a contribution obligation.”²

¹ See Comments of SBC Communications Inc. at 3 (filed Apr. 22, 2002) (“SBC Comments”) (“[A]ll competing broadband Internet access providers should be required to contribute to the federal universal service fund.”).

² *Id.* at 5.

SBC defines a QSC as “a retail relationship with a service provider that gives an end user the right to connect to its network.”³ SBC further explains that “a single provider may be assessed multiple contributions for an integrated service offering.”⁴ SBC identifies two distinct types of QSCs: Access QSCs and Transport QSCs. According to SBC, “Access QSCs include any type of access to a circuit-switched or packet-switched interstate transport network . . . [including] dedicated Internet access (e.g., DSL, cable modem, satellite, wireless data).”⁵ By contrast, SBC states that “Transport QSCs include traditional IXC long distance service . . . and the interstate transport associated with Internet traffic.”⁶ Thus, an ISP apparently would make *two* USF contributions – one based on its “provision” of access and one based on its “provision” of interstate transport.

The Commission should – and, indeed, must – reject the Joint Proposal. Because ISPs do not “provide” telecommunications to anyone, the Commission lacks statutory authority to adopt any proposal that would require ISPs to make direct payments to the USF. Even if the Commission had the authority, however, doing so would be unsound as a policy matter. Contrary to the two BOCs’ assertions, there is no evidence that the migration of traffic from the public telecommunications networks to the Internet is eroding the USF funding base and shifting the burden of supporting universal service to “local telephone customers.” Nor do concerns about competitive neutrality require the imposition of USF payment obligations on ISPs. To the contrary, imposing USF payment obligations on ISPs would have significant adverse consequences.

³ *Id.* at 9.

⁴ *Id.* at 10.

⁵ *Id.* at 9.

⁶ *Id.*

A. The Two BOCs' Contention That ISPs "Provide" Telecommunications Ignores Statutory Language, Legislative History, Commission Decisions, and Judicial Precedent

The Joint Proposal is based on a simple premise: ISPs – like interexchange carriers and resellers – “provide interstate telecommunications.”⁷ Thus, SBC asserts:

Even though an ISP may purchase telecommunications services from a LEC where it does not own its own broadband information access facilities, it also *provides telecommunications to its end users*. An ISP also provides end users with *interstate transport* over a packet-switched network associated with the public Internet.⁸

Therefore, the two BOCs conclude, like IXC and resellers, ISPs can and should be required to make direct payments to the Universal Service Fund.⁹

The two BOCs' premise is indisputably wrong. ISPs do not *provide* telecommunications or telecommunications services to any party. Therefore, the Commission cannot adopt any proposal that would require ISPs to make direct payments to the USF.

SBC and BellSouth have entirely ignored statutory language, legislative history, Commission decisions, and judicial precedent. Section 254(d) of the Communications Act, which was adopted as part of the Telecommunications Act of 1996, allows the Commission to require “provider[s] [of] interstate telecommunications . . . [to] contribute” to universal service.¹⁰ The Act makes clear that an entity that provides an information service is “offering . . . a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available

⁷ See *Id.* at 8-9 (“[I]t is more appropriate to treat ISPs like IXCs, rather than end users, for universal service purposes.”).

⁸ *Id.* (emphasis added).

⁹ *Id.* at 9 n.12 (“For the same reason that a reseller of long distance service is required to contribute, . . . an ISP that provides broadband information access and interstate transport services should be required to contribute [to the USF], even if it does not own its own facilities.”)

¹⁰ See 47 U.S.C. § 254(d).

information.”¹¹ While that capability is made available “via telecommunications,”¹² this does not make an ISP a telecommunications provider. As the Senate Committee Report that accompanied the Telecommunications Act explained, “Information Service Providers do not ‘provide’ telecommunications services; they are users of telecommunications services.”¹³

Consistent with this view, the Commission observed in the *Report to Congress on Universal Service* that:

Under *Computer II*, and our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and is categorized as an information service. The information service provider, indeed, is itself a user of telecommunications.”¹⁴

The possibility that an ISP may deploy its own “last mile” wireline transmission facilities does not change the analysis. As the Commission just recently observed, an ISP “offering . . . service over its own facilities does not offer ‘telecommunications’ to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services.”¹⁵

Contrary to SBC’s assertion, ISPs are fundamentally different from either resellers or IXC’s. These providers offer a “pure” transmission service directly to the public for a fee – either over their own telecommunications facilities or facilities obtained from another carrier.

¹¹ *Id.* § 153(20).

¹² *Id.*

¹³ S. Rpt. 104-23, 104th Cong, 1st Sess., at 28 (1995). Further evidence that Congress did not intend for ISPs to be treated as telecommunications carriers comes from the fact that, in several places, the legislation clearly distinguishes telecommunications and information services. See, e.g., 47 U.S.C. § 254(h)(2) (Commission to promote access to both “advanced telecommunications and information services.”).

¹⁴ *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, 11534 n.138 (1998) (“*Universal Service Report to Congress*”).

¹⁵ *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3033 (2002).

Therefore, consistent with the Telecommunications Act and the Commission's Rules, IXC's and resellers are classified as common carriers and, consequently, are subject to regulation under Title II of the Communications Act – including the obligation to make direct payments to the USF.

By contrast, an ISP that allows a subscriber to access its service is neither providing nor reselling local telephone service. This is clearly true when the subscriber accesses the ISP's service using its own dial-up connection. In this case, it is the local exchange carrier ("LEC") – not the ISP – that is allowing a retail subscriber to access *its* network. The subscriber, in turn, uses the LEC's local exchange service to access the ISP of its choice. Even when the ISP "bundles" its service with a broadband transmission service, such as Digital Subscriber Line Service ("DSL"), the ISP is *using* telecommunications to deliver its non-regulated service to its subscribers. Similarly, when the ISP enables its subscriber to interact with remote computer servers on the Internet, it is neither providing nor reselling an interstate telecommunications service. Rather, it is *using* interstate packet networks – in conjunction with its own computer processing capabilities – to allow its subscribers to access, manipulate, and/or store information.¹⁶

¹⁶ The Commission has consistently distinguished ISPs from IXC's for purposes of implementing its carrier access charge regime. The Commission's 1983 *Access Charge Order* divided users of the local network into two categories: interexchange carriers and end-users. See *MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241 (1983) ("*Access Charge Order*"), *aff'd sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). IXC's are subject to the Commission's carrier access charge regime. By contrast, end-users (including ISPs) compensate LEC's for their use of the local telephone network by paying a mix of flat-rate Federal end-user charges and State charges. In the *Access Charge Reform Order*, adopted in 1997, the Commission concluded that, because "ISPs [do not] use the public switched network in a manner analogous to IXC's," it would be inappropriate to impose carrier access charges on ISPs. *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997) ("*Access Charge Reform Order*"). The Eighth Circuit expressly upheld this conclusion, observing that the Commission has "justified its decision . . . by noting the distinction between the manner in which these separate entities utilize the local networks." See *Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998).

The Commission has also consistently distinguished ISPs from resellers. The Commission has never expressly "exempted" ISPs from carrier access charges. Rather, at the time it adopted the *Access Charge Order*, the Commission assumed ISPs would be treated like other business customers, rather than carriers. By contrast, the

Taken to its logical conclusion, SBC's reasoning would require the Commission to classify all businesses that make significant use of interstate telecommunications services in order to serve their customers as telecommunications providers. Under this approach, numerous business users – such as banks, stockbrokers, credit card validation services, and travel agencies – would be required to make direct payments to the USF. Congress plainly did not intend for the Commission to cast its net so broadly.

B. SBC and BellSouth Have Failed to Provide Any Justification for Imposing USF Direct Payment Obligations on ISPs

Even if the Commission had legal authority to adopt the Joint Proposal, it would be unwise to do so. SBC and BellSouth have provided virtually no justification for the radical change in policy that they propose.

1. There is no evidence of significant “bypass”

SBC and BellSouth assert that the Commission must require ISPs to make direct payments to the USF in order to close a “loophole” that allegedly is allowing providers of “interstate telecommunications” to move traffic to the Internet in order to evade making payments to the USF, thereby forcing “local telephone customers” to “bear an unreasonable share of the universal service costs.”¹⁷ The two BOCs, however, have not bothered to explain how this supposed “bypass” is occurring.

Commission created an *express* exemption for resale carriers. See *Access Charge Order*, 93 F.C.C.2d at 344 (reprinting former Section 69.5 of the Commission's Rules). The Commission subsequently eliminated this exemption based on its conclusion that “resellers of private lines . . . [should] pay the same charges as those assessed on other interexchange carriers for their use of these local switched access facilities.” *WATS-Related and Other Amendments of Part 59 of the Commission's Rules*, Second Report and Order, CC Docket No. 86-1, ¶¶ 11-14, reprinted in 60 Rad. Reg.2d (P&F) 1542, 1548-49 (rel. Aug. 26, 1986) (emphasis added).

¹⁷ SBC Comments at 14; see Comments of BellSouth Corp. at 4 (filed Apr. 22, 2002) (“BellSouth Comments”) (The Commission must “close the current contribution loophole that allows for interstate communications to shift to internet-based offerings provided by internet service providers . . . and, thus, escape assessment for universal service purposes.”); see also SBC Comments at 13 (“Congress granted the Commission the authority to include providers of ‘interstate telecommunications’ in the contribution base for the express purpose of addressing traditional bypass of the public telephone network from alternative networks (e.g., private carriers).”).

To the extent SBC and BellSouth are referring to so-called Internet Telephony services, there is no evidence that it is having any discernable effect on universal service. As ITAA explained in its comments in the *Wireline Broadband Internet Access* docket:

Despite growth in recent years, Internet telephony remains a niche service. In calendar year 2000, carriers reported approximately \$81.7 billion in end-user interstate and international telecommunications revenue. By contrast, one analyst estimates that IP telephony end-user revenues during that period totaled \$310 million. Thus, even if ISPs were required to make direct payments to the USF, the size of the funding base would increase by less than 0.4 percent.¹⁸

In any case, the growth of Internet telephony plainly has not required “local telephone customers” to assume a greater share of USF costs. To the (miniscule) extent that Internet telephony reduces carriers’ end-user telecommunications revenues – and, hence, the USF contribution base – interstate and international callers are required to shoulder the increased burden.

2. Requiring ISPs to make direct USF payments would not promote “competitive neutrality”

SBC also urges the Commission to “ensure that, to the greatest extent possible, its contribution rules have no impact on end user buying decisions.”¹⁹ While ITAA supports this goal, it is entirely unnecessary to require ISPs to make direct payments to the Universal Service Fund in order to achieve it. Under the connection-based system proposed by the Coalition for

¹⁸ Comments of the Information Technology Association of America, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, , CC Docket No. 02-33, at 45 (filed May 3, 2002) (footnotes omitted) (“ITAA Wireline Broadband Internet Access Comments”).

¹⁹ SBC Comments at 14; *see id.* at 8-9 (“In order to maintain consistency with the contribution mechanism for traditional circuit-switched traffic, the Commission should require ISPs . . . to contribute to universal service based on the provision of broadband information access and interstate transport services to an end user.”); *see also id.* at 4 (“The universal service contribution base should be broadly defined so that *interstate telecommunications activity* generates the same universal service obligation, regardless of a provider’s technology platform, organizational structure, marketing practices or position in the market.” (emphasis added)).

Sustainable Universal Service (“Coalition”), no ISP would be required to make direct payments to the USF.²⁰ Rather, ISPs would continue to support universal service through the payments that they make to their telecommunications provider – which, in most cases, will include a “pass through” of the carrier’s USF payment. As a result, all ISPs that use carrier-provided telecommunications facilities would be on an equal competitive footing.

Requiring non-carrier ISPs that self-provide telecommunications facilities to make payments to the USF is not necessary to ensure competitive neutrality. As ITAA explained in its comments in the *Wireline Broadband Internet Access* docket:

There is no evidence that ISPs are deploying their own last mile facilities in order to avoid contributing to universal service. Indeed, given the substantial cost of doing so, and the level of risk that must be incurred, there is little reason to believe that many ISPs are likely to deploy their own last mile facilities in order evade these costs. Even if an ISP were to do so, however, it would still meet a significant portion of its need for telecommunications by obtaining services from other carriers, such as high-capacity links into the Internet. In that case, the ISP would continue to contribute to universal service [through the payments that they make to their telecommunications provider], thereby reducing any competitive advantage it might obtain.²¹

Neither is there any need to impose USF payment obligations on ISPs that use cable to deliver service to their subscribers. Here, again, ITAA fully addressed this issue in its comments in the *Wireline Broadband Internet Access* docket. As ITAA explained:

Competitive neutrality does not require *identical* treatment of all market participants. The Communication Act maintains significant distinctions among platform providers. Rather, the competitive neutrality requirement obligates the Commission to consider these differences and to develop a universal service funding regime that, on balance, neither significantly advantages nor disadvantages any particular class of competitors. . . . While [cable system operators] may not have to make direct payments to the USF, they must often

²⁰ Comments of the Coalition for Sustainable Universal Service (filed Apr. 22, 2002) (“Coalition Comments”).

²¹ ITAA Wireline Broadband Internet Access Comments at 48.

pay substantial franchise fees – which often have an assessment rate nearly as high as the current USF “contribution rate.” In addition, cable system operators must forgo significant revenues in order to comply with requirements to devote capacity to so-called PEG (public interest, educational and government) and to public access programs.²²

These costs, of course, are passed on to ISPs that use cable systems and, ultimately, to their customers – thereby reducing any competitive advantage that “cable ISPs” may have.

C. Adoption of the Joint Proposal Would Have Significant Adverse Consequences for ISPs

In its comments in the *Wireline Broadband Internet Access* docket, ITAA demonstrated that requiring ISFs to make direct payments to the USF would have a number of adverse consequences.²³ In particular, ITAA observed that if:

the Commission were to . . . treat ISPs as telecommunication providers, rather than end-users, for *universal service* assessment purposes, the ILECs will no doubt argue that ISPs should be treated as telecommunications providers for *access charges* purposes. Requiring ISPs to pay above-cost, per-minute carrier access charges, would make it difficult for ISPs to continue to offer subscribers offer low-cost, flat rate access to the Internet, thereby jeopardizing the continued growth and vitality of the Internet.²⁴

The SBC/BellSouth Joint Proposal would have two additional adverse consequences for the ISPs. First, it would substantially increase the cost of Internet access service, especially for residential customers that seek to obtain broadband connections, thereby artificially suppressing demand. And, second, it would provide carrier-affiliated ISPs with an unfair competitive advantage over their non-carrier affiliated competitors.

²² *Id.* at 50-51 (footnotes omitted; emphasis in original).

²³ *See id.* at 51-54.

²⁴ *Id.* at 53.

1. The Joint Proposal would artificially reduce demand for Internet services

As noted above, under the Joint Proposal, an ISP apparently would make *two* USF contributions – one based on its “provision” of access and one based on its “provision” of interstate transport. Because the size of the contribution would increase, *for both residential and business customers*, based on the capacity of the connection, these charges could become substantial – especially for subscribers that use broadband Internet access services.

For example, under the Joint Proposal, an ISP that provides a DSL-based residential Internet access service would be required to pay two times the base assessment for the Access QSC.²⁵ The Joint Proposal provides no indication of the charge that would be imposed on the ISP for the Transport QSC. However, given the high capacity of the Internet backbone service that the ISP would be deemed to be providing this contribution could be as much as forty times the base assessment.²⁶ At the same time, carriers presumably would continue to be required to make USF payments based on the underlying connections that they provide to ISPs – and presumably would continue to pass these costs on to the ISPs. ISPs, in turn, would have little choice but to pass all of these costs on to their customers. The end-result would be to artificially slow the growth of the Internet.

2. The Joint Proposal would give carrier-affiliated ISPs an unfair competitive advantage

The Joint Proposal also would give carrier-affiliated ISPs an advantage over non-affiliated ISPs in the dial-up Internet access market. If a residential customer purchases a dial-up

²⁵ See SBC Comments at 11 (connection charges for connections greater than 64 Kbps and less than 1.5 Mbps). By contrast, a LEC that provides both local exchange and exchange access service apparently would have to make one USF contribution at the base amount.

²⁶ See *id.* at 11 (Connection charges for connections greater than or equal to 45 Mbps would be 40 times the base amount.).

line from a LEC, the LEC would pay a single “Access QSC” charge. If the customer subsequently orders the LEC’s dial-up Internet access service, the LEC presumably would not have to pay an additional access connection charge. Rather, the only new charge would be for the provision of the “Transport QSC.” By contrast, if the customer chose to obtain dial-up Internet access service from a non-affiliated ISP, the ISP presumably would be required to make two connection charges – one for the Access and one for the Transport QSC. Such a result plainly is inconsistent with the principle of competitive neutrality.

In light of the above, the Commission should reject the SBC/BellSouth proposal.

II. THE COMMISSION ALSO SHOULD REJECT VERIZON’S PROPOSAL, WHICH WOULD REQUIRE BROADBAND ISPs TO MAKE DIRECT PAYMENTS TO THE SCHOOLS AND LIBRARIES FUND

Verizon has advanced a narrower proposal, under which the Commission would require all broadband ISPs “to contribute to the schools and libraries fund on an equal basis.”²⁷ Verizon’s argument, in essence, is that the principle of competitive neutrality requires that all entities that “are eligible to provide services to schools and libraries, subsidized by the schools and libraries fund” should be required to make payments “to the universal service fund based on broadband revenues.”²⁸

Verizon, like SBC and BellSouth, invites the Commission to disregard the statutory limitations of its authority. As discussed above, ISPs do not *provide* telecommunications; they *use* telecommunications to provide information services to their subscribers. Because ISPs do not provide telecommunications, the Commission lacks statutory authority to require them to

²⁷ Comments of Verizon at 24-25 (filed Apr. 22, 2002) (“Verizon Comments”).

²⁸ *Id.*

make payments to the USF – regardless of what transmission platform they use to deliver services.²⁹

Verizon’s suggestion that allowing ISPs to participate in the schools and libraries program, even though they are not required to make direct payments to the USF, violates “competitive neutrality” is nothing more than old whines in new dockets. The Commission and the Court of Appeals have considered whether allowing ISPs to participate in the schools and libraries program violates the principle of competitive neutrality. Both have concluded that it does not.

In the original *Universal Service Order*,³⁰ the Commission expressly considered – and rejected – the argument, advanced by several of the BOCs (including one of Verizon’s predecessors, NYNEX) that “providing support to non-telecommunications carriers [in order to provide service to schools and libraries] would violate the competitive neutrality requirement . . . because non-telecommunications carriers could benefit from universal service support but only telecommunications carriers would be required to contribute to that support.”³¹ As the Commission explained, “[n]either telecommunications carriers nor non-telecommunications carriers . . . will be required to contribute to universal service support mechanisms based on their

²⁹ To the extent Verizon is suggesting that cable systems and other broadband platform operators should be required to make direct payments to the USF based on their provision of broadband connectivity used to provide Internet access to schools and libraries, its proposal is – at best – premature. At the present time, the Commission has not determined whether the transmission functionality that a cable system operator or other broadband platform operator uses to provide Internet access service constitutes “telecommunications” and, if so, whether to impose an obligation on the operators to offer that transmission functionality, on an unbundled basis, as a telecommunications service. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4844-49 (2002). Unless the Commission determines that cable system operators and other broadband platform providers are providing telecommunications – or are required to provide telecommunications services – the Commission lacks statutory authority to require these operators to make direct payments to the USF.

³⁰ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776 (1997) (“*Universal Service Order*”).

³¹ *Id.* at 9088.

provision of Internet access Thus, telecommunications carriers' contributions will not place them at an unfair competitive disadvantage" when they provide Internet access service.³²

Another of Verizon's predecessors, GTE, appealed this aspect of the Commission's decision to the Fifth Circuit. In its brief, GTE argued that, because non-telecommunications-carriers "have paid nothing into the federal support plan" it would not be competitively neutral for them "to receive subsidy payments of out it."³³ The Commission's approach, GTE added, would place telecommunications carriers at a competitive disadvantage by requiring them to "bear the entire burden of funding universal service support while they are then required to compete against non-carriers that bear no similar burden."³⁴ The Fifth Circuit rejected GTE's contention, finding that the Commission's decision "ensure[s] that Congress' instructions on expanding universal service [to schools and libraries] in the form of internet access . . . will not be frustrated by local monopolies."³⁵

In light of the above, the Commission should reject the Verizon proposal.

III. THE COMMISSION SHOULD ENSURE THAT THE BURDEN OF FUNDING ANY FUTURE GROWTH IN THE UNIVERSAL SERVICE FUND IS SHARED PROPORTIONATELY BY ALL CLASSES OF USERS

In its initial comments, ITAA noted that, while it supports adoption of a connection-based assessment methodology, it is concerned that "if the size of the universal service program were to increase over time, charges assessed based on connections provided to multi-line businesses customers . . . could rise significantly. This, in turn, could lead telecommunications

³² *Id.*

³³ Brief of GTE Entities, *Texas Office of Public Utility Counsel v. FCC*, at 88 (5th Cir. No. 97-60421).

³⁴ *Id.*

³⁵ See *Texas Office of Public Utilities Counsel v. FCC*, 183 F.3d 393, 443-44 (5th Cir. 1999).

carriers to significantly increase prices charged to multi-line business customers.”³⁶ ITAA therefore proposed that the Commission adopt a process under which it would: (1) review annually the percentage of USF charges generated based on the provision of services to multi-line business customers and the percentage of USF payments attributable to connections provided to residential, single-line business, and mobile customers and (2) “adjust proportionately the USF charges assessed for connections provided to residential, single-line business, and mobile customers” if, over time, “the portion of the total USF payments attributable to these customers has increased or decreased . . . by more than ten percent.”³⁷

In its comments, the Coalition for Sustainable Universal Service has proposed a different means of addressing this problem. Under the Coalition’s proposal, if the size of the USF increases, “all consumer segments [w]ould bear the impact of such increases proportionately.”³⁸ ITAA believes that a procedure that would provide for an *automatic, annual, proportionate adjustment* of the assessment rate for *all* connections – whether provided to residential, single-line business, wireline, or multi-line business customers – offers an effective means to ensure that the burden of any further growth in the USF is shared equitably among all classes of users. If the Commission does not adopt an annual proportionate adjustment, however, ITAA urges the Commission to adopt the proposal contained in its comments. Either approach would be preferable to the imposition of a freeze on the residential, single line business, and wireless

³⁶ Comments of the Information Technology Association of America at 11 (filed Apr. 22, 2002) (“ITAA Comments”).

³⁷ ITAA also proposed that the Commission “conduct a review, one year after the full implementation of the connection-based regime” and that “[i]f the Commission determines, at that time, that the transition to a connection-based assessment regime has materially altered the ‘balance’ between residential and business customers – or adversely affected a discernable class of customers – the Commission should adjust the contribution factors.” *Id.* at 12.

³⁸ Coalition Comments at 64.

connection charge, which would require multi-line business customers, alone among all user classes, to fund any increase in the size of the universal service program.

CONCLUSION

For the foregoing reasons, and those discussed in ITAA's initial comments, the Commission should adopt a connection-based universal service assessment methodology, under which entities that provide telecommunications or telecommunications services would make direct payments to the USF based on "network connections" that they provide to end-users. The Commission also should adopt procedures that will ensure that the new methodology does not adversely affect any class of users, and that the burden of funding any growth in the USF is shared proportionately among all user classes. The Commission, however, should not – and, indeed, cannot – impose on Information Service Providers the obligation to make direct USF payments.

Respectfully submitted,

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